

06/11/01

**THIS DISPOSITION
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Paper No. 10
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **National Nursery Products, Inc.**

Serial No. 75/672,070

John E. Vanderburgh for applicant.

Inga Ervin, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

Before Quinn, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by National Nursery Products,
Inc. to register the mark shown below

("NATIONAL NURSERY PRODUCTS" disclaimed) for "living
plants, namely, annual and perennial plants and tropical

plants; living trees, namely, flowering trees and foliage trees; fresh vegetables, fresh herbs, and mulch."¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used in connection with applicant's services, so resembles the previously registered mark NATIONAL NURSERIES, LTD. ("NURSERIES" disclaimed) for "plants, namely, nursery stock including hanging baskets, aglaonemas, brassaia, codiaemum, dieffenbachia, dracaena, ficus, palms, spathiphyllum and yucca"² as to be likely to cause confusion.³

When the refusal to register was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs.⁴ An oral hearing was not requested.

The Examining Attorney maintains that the marks are dominated by virtually identical portions, "NATIONAL" and "NURSERY/NURSERIES," and that the design feature of

¹ Application Serial No. 75/672,070, filed March 29, 1999, based on an allegation of a bona fide intention to use the mark in commerce. The application includes the following statement: "The lining shown in the drawing is not intended to indicate color."

² Registration No. 1,327,298, issued March 26, 1985 pursuant to Section 2(f); Section 8 affidavit filed and accepted.

³ The reference to Registration No. 2,003,575 in the Examining Attorney's brief is an obvious typographical error.

⁴ The final refusal under Section 2(d) was based on two cited registrations. In her appeal brief, the Examining Attorney withdrew the refusal based on Registration No. 1,883,816. Accordingly, no consideration need be given thereto.

applicant's mark does not sufficiently distinguish it from registrant's mark. As to the goods, the Examining Attorney states that they are related, if not identical.⁵

Applicant argues that the marks are dissimilar and that the portions common to both marks are weak. Applicant argues that its products "are distributed through dealers and/or sold wholesale to garden shops and similar retail outlets." (brief, p. 10). Applicant also asserts that its customers are "not impulse buyers but businessmen who carefully consider their purchases and who know the suppliers that they are dealing with." (brief, p. 10).

Before turning to the merits of the refusal, an evidentiary matter requires our attention. In connection with its argument that the cited registration is entitled to a narrow scope of protection, applicant submitted, for the first time with its appeal brief, a computer printout retrieved from the Office's TESS database showing listings of third-party registrations. The Examining Attorney's brief is completely silent on this submission.

The record in an application should be complete prior to the filing of an appeal, and the Board will ordinarily not consider additional evidence filed with the Board after

⁵ The attachments referred to in the Office action dated June 29, 2000 are not in the application file.

the appeal is filed. Trademark Rule 2.142(d). Nonetheless, evidence submitted after appeal may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. *TBMP* §1207.03 and cases cited thereat. In the present case, as indicated above, the Examining Attorney made no reference to applicant's submission. Accordingly, the evidence attached to applicant's appeal brief does not form part of the record on appeal and has not been considered in making our decision.⁶

We now turn to the issue on appeal. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

⁶ We hasten to add that, even if considered, the printout submitted by applicant would be entitled to little probative weight. The problem is that the printout merely lists the registrations with no reference to the particular goods and/or services identified in the registrations. Thus, in many cases, it is not known whether the registrations cover goods and/or services in the horticultural field; in point of fact, some of the registrations (e.g., "NFB NATIONAL FEDERATION OF THE BLIND") would appear to be registered for services entirely unrelated to the goods involved in this appeal. In order to have made any of the listed registrations of record, it was necessary for applicant to submit a printout of the registration itself that was retrieved from the TESS database.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, applicant does not dispute that the goods are substantially similar and, at least in part, are legally identical. Applicant's broadly worded items in its identification of goods "perennial plants, tropical plants and foliage trees" encompass some of the specific plants (e.g., "palms, ficus, yucca") listed in registrant's identification.

With respect to the marks, we note at the outset that, if the goods are identical, as they are here at least in part, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In comparing the marks NATIONAL NURSERY PRODUCTS and design and NATIONAL NURSERIES, LTD., there are obvious similarities between the marks in sound and meaning. The first words in the marks are identical, followed by singular/plural versions of the same word. Although the marks include the terms "PRODUCTS" and "LTD.," these

generic designations hardly serve to distinguish the marks in any meaningful way. Clearly, the literal portions of the marks are dominated by the virtually identical terms, NATIONAL NURSERY and NATIONAL NURSERIES, and the terms convey virtually identical meanings. See: In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)[“there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on a consideration of the marks in their entireties...”]. Although applicant urges that the registered mark is entitled to a narrow scope of protection, we find, based on the record before us, that this scope extends to protection against applicant’s mark.

In comparing the marks in terms of appearance, we have considered the design portion of applicant’s mark. The plant design reinforces the “NURSERY” portion of the mark. Although we have considered the design portion in our comparison of the marks, we find that it is subordinate to the words “NATIONAL NURSERY PRODUCTS.” The literal word portion will be used to call for the services and will be the portion most likely to be remembered by purchasers. See: In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

In sum, the marks, when considered in their entirety, engender similar overall commercial impressions. It is the general overall commercial impressions engendered by the marks that must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.

We note applicant's point that its customers are garden shops and similar retail outlets that are run by businessmen who are likely to be experienced and sophisticated in the horticultural trade. The problem with this argument is that neither the involved application nor the cited registration includes any limitation on channels of trade or classes of customers. Thus, it must be assumed that the applicant's and registrant's plants move through all the normal channels of trade for such goods, and would be offered to all types of purchasers. *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990). In the present case, therefore, we must assume that the plants of applicant and registrant are sold in the same channels of trade to the same classes of purchasers (both garden dealers and the general public). The general public would include many consumers who are not likely to be knowledgeable about

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plants, much less capable of distinguishing between the sources of these plants sold under these two highly similar marks. Moreover, to the extent that the plants are sold to garden dealers, given the highly similar marks and goods, even the sophistication of this class of purchasers will not ensure against the likelihood of confusion.

Decision: The refusal to register is affirmed.